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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1966

No. 1164

SAUL LANDAU,
Petitioner,

vs.

ADDISON FORDING, CHIEF OF POLICE, BERKELEY, CALIFORNIA, EARL BERGFELD, THE POLICE DEPARTMENT OF THE CITY OF BERKELEY, and THE CITY OF BERKELEY, a municipal corporation,
Respondents.

PETITION FOR REHEARING

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PETITION FOR REHEARING

To the Honorable Earl Warren, Chief Justice of the Supreme Court of the United States and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully applies for a rehearing after the judgment of this Court made on June 12,

1967, which, *per curiam* and without opinion, granted his petition for certiorari and affirmed the judgment below, four Justices noting their dissents and voting to reverse the judgment below. On petitioner's timely motion, Mr. Justice Douglas has extended the time for the filing of this petition to and including August 11, 1967, and has stayed the issuance of the mandate until such time as the petition is acted upon.

Briefly related, the facts are that this Court held the film "Un Chant d'Amour" not protected by the First Amendment no matter in what circumstances or to whom it is exhibited. The judgment of the California Courts was that the film must be totally banned and it is this judgment which stands affirmed.[1]

SUMMARY OF REASONS FOR GRANTING A REHEARING

Of the seventeen decisions of the 1966 Term reaching the merits of the application of anti-obscenity laws, in only one did a majority of the Court find the material not protected by the First Amendment. That one was No. 1164, *Landau v. Fording,* and the decision was the first since obscenity has become a constitutional issue where the Court agreed with the censor

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[1]By affirming the judgment, rather than denying certiorari or dismissing the writ, the Court has seemingly denied the film any constitutional protection from state action since California's test for obscenity is as strict, if not stricter, than required by the Fourteenth Amendment. See *Zeitlin v. Arnebergh,* 59 Cal. 2d 901, 911-12. However, the Court's judgment would not be *stare decisis* for the application of federal law since Mr. Justice Harlan would not so readily be a member of the 5-4 majority if this case had arisen under the federal mailing or customs statute.

when a finding of "obscene" was contested.[2] This unique finding by the Court was made for *all uses* of the film in *all circumstances* since the judgment now affirmed was in a civil proceeding resulting in a *total ban* on the film. The major point of this petition is that the Court ought to consider the specialized uses of the film "Un Chant d'Amour," aside from its appeal to the general public, just as in two cases now pending in this Court[3] the question of specialized restrictions for younger persons will be considered.

I. THE USES OF THE FILM

In *Landau v. Fording* the film itself was on trial, not a defendant, and among the important and recurring issues left unanswered by the Court's *per curiam* adjudication is whether or not in such a case the test of *Roth v. United States,* 354 U.S. 476, should be adjusted to accommodate the socially redeeming uses of a film where some such uses are indisputably available.

In *Memoirs v. Mass.,* 383 U.S. 413, 420-421, Mr. Justice Brennan commented that where the parties presented no specific set of circumstances relating to

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[2] *Roth v. United States,* 354 U.S. 478, proceeded on the concession that the material was obscene; in *Ginzburg v. United States,* 383 U.S. 463, the material was assumed not to be obscene; in *Mishkin v. New York,* 383 U.S. 502, the issue of social importance was not raised (383 U.S. at 508).

[3] *Interstate Circuit, Inc. v. City of Dallas,* No. 56, Oct. 1967 Term, and *United Artists Corporation v. Dallas,* No. 64, Oct. 1967 Term, both cases probable jurisdiction noted May 15, 1967.

the production, sale or distribution of a book, and the question before the Court thus was, as in the instant case, the obscenity of a book in the abstract, the Court should consider all possible uses of the book. Two propositions should follow logically from this:

(A) Where the question is the outright banning of the work itself, rather than the prohibition of its dissemination by a particular distributor, then the work, if it is to be banned, must be obscene under all circumstances; and

(B) Where a work of a modicum of social importance is exhibited on the basis of its socially important features rather than on the basis of its prurient appeal, that communication is constitutionally protected.

Although these propositions appear to be self-evident, the Court's decision in *Landau v. Fording* contradicts them, and leaves the law in considerable doubt as to what use or audience is to be considered where the work itself is on trial.

The question whether a work must be obscene under all circumstances in order to be totally banned is important and recurring. *Central Sales Magazine v. United States,* No. 368, Oct. Term 1967, pending on petition for writ of certiorari, presents the identical problem in the context of the customs law, 19 USC sec. 1305. Can magazines be indiscriminately banned without regard to the use to which they may be put? If the Court grants the petition for a writ of certiorari in the *Central Sales Magazine* case to consider this issue, it should also grant the instant Petition for

Rehearing and allow petitioner to file a brief on the merits of his case.[4]

The trial record in *Landau v. Fording* makes it clear that even if the film were prohibited to the general public, "Un Chant d'Amour" potentially has many valuable uses. Dr. Bernard Diamond, a psychiatrist and professor of law and criminology, would like to have the film available as a teaching device. (R.T. 220.) Critic Susan Sontag found the work to possess importance as part of the history of film (R.T. 157), and the trial Court conceded that the film might be of some interest to psychiatrists or social scientists. (C.T. 96.) In addition, the film is of interest to students of aesthetics (see Professor Linenthal's testimony at R.T. 130, et seq.) as well as to students of the works of Genet (see Appendix C to the Petition for Certiorari).

The judgment totally banning the film forbids all such uses: for example, a professor of criminology commits a criminal act when he shows it to his students, thus reducing their knowledge of prisons, homosexuality and art; a showing of the film on the basis of its style and technique to film critics is also a criminal act.

There can be no justification for such an interference with First Amendment-protected communication; such communication cannot be banned to prevent an

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[4]The related issue of a selective *ban* is presented by *Interstate Circuit, Inc. v. City of Dallas;* No. 56, Oct. Term 1967, probable jurisdiction noted May 15, 1967, and *United Artists Corp. v. Dallas*, No. 64, Oct. Term 1967, probable jurisdiction noted May 15, 1967.

appeal to prurient interest any more than all sex could be banned to prevent rape. In *Roth* it was clearly held that the door barring censorship "must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests." But it is quite apparent from the record that to professors, critics, film makers, a psychiatrist and a prison counselor, the film does have value. It is not necessary to open the door of censorship so wide as to suppress even these values. The persons who submitted affidavits and testified on behalf of the film were not shams or charlatans. If the total ban this Court has approved is permitted to stand, they and others with similar interests and concerns will be unable to see the film. The First Amendment surely was not designed to permit such a diminution of the ability to acquire information and knowledge. A total prohibition of the film is too inflexible to serve First Amendment needs. See *U.S. v. 31 Photographs* (SD NY 1957) 156 F.Supp. 350.

It is necessary to point out that the trial of this action took place before this Court's decision in *Memoirs v. Massachusetts, supra,* and therefore the California Courts did not consider the particular uses to which "Un Chant d'Amour" could be put. A remand for that purpose would be appropriate.

II. THE MEANING AND EFFECT OF THE COURT'S HOLDING

The Court's *per curiam* order affirming the judgment of the Court of Appeal of California represents the first time, since *Roth v. United States, supra,* recognized the First Amendment problems in obscenity determinations, that the Supreme Court has affirmed a judgment banning a work where social importance was contested. Such an important holding creates a momentum of its own and raises questions concerning its meaning and dimensions which deserve a Court opinion. Uncertainty in the First Amendment area should be avoided wherever possible for reasons of its deterrent effect. Where this uncertainty is created by the meaning of a decision, it should be ameliorated.

The situation is not similar to that where the Court by *per curiam* order *reverses* a finding of obscenity. Such a statement informs lower Courts, prosecuting attorneys and censorship boards of what *cannot* be proscribed as obscene. Earlier *per curiam* reversals in fact led many commentators to believe that the Court eventually would hold only what may be described as "hard core pornography" to be outside First Amendment protection (Lockhart & McClure, "Censorship of Obscenity: The Developing Constitutional Standards," 45 Minn. L. Rev. 5 (1960)). When the Court informs the censoring authorities what *can* be proscribed, the situation is totally different. It then becomes necessary for the Court to speak with limiting clarity, lest the would-be censor seize upon the Court's

opinionless decision to justify the suppression of constitutionally protected material. Moreover, when a holding of the Court, without opinion, extends the bounds of permissible censorship beyond the line of hard core pornography, the reins on censorship are all the more loosened. Bench and bar then know that some controversial material may be suppressed, but they are not informed as to how to identify suppressible material. A *per curiam* holding saying in effect, "This but not that," without articulating the reasons therefor, can only lead the censoring authorities to conclude that the answer eventually will depend upon the Court's subjective reactions, and encourage such authorities to rely upon *their* subjective reactions, or to speculate as to the Court's, in making the initial determination of what to suppress. Surely the Court ought not to authorize emotion and speculation, rather than reason, as the basis for decision in this delicate area.

In other First Amendment areas, "sensitive tools" are called for to delineate the bounds between legitimate and illegitimate speech. (*Speiser v. Randall,* 357 U.S. 513, 525.) Such sensitive tools are required whether the issue be loyalty oaths (*Baggett v. Bullitt,* 377 U.S. 360) or obscenity (*A Quantity of Books v. Kansas,* 378 U.S. 205; *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58). Speech remains a "transcendent value" making it incumbent upon the Court to delineate as best as possible the dim and uncertain line that separates obscenity from constitutionally protected expression. *Jacobellis v. Ohio,* 378 U.S., at 187.

The uncertainty created by the decision in *Landau v. Fording* is magnified when compared with other decisions made the same day. Could there be an acceptable reason why in *Ratner v. California*, ... U.S. .... (June 12, 1967) the film "Honey Bee" was found fully protected by the First Amendment while Genet's "Un Chant d'Amour" is found unprotected by the First Amendment *under any circumstances*? Does this mean that a film which is serious in its treatment of sex is less protected than one which is teasing? Does this mean that the Second Circuit was in error in finding the film "491" protected (*United States v. One Carton, etc., Entitled "491"*, 367 F. 2d 889 (2d Cir. 1966) even though its treatment of sex was shocking and far exceeded customary standards? Does this mean that serious experimental films about sex are taboo? These questions can be answered and we urge the Court to do so before the momentum created by silence cuts to an irreparable depth.

Dated, San Francisco, California,
August 9, 1967.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

LANDAU *v.* FORDING ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT.

No. 1164. Decided June 12, 1967.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment of the Court of Appeal of California, First Appellate District, is affirmed.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE STEWART, and MR. JUSTICE FORTAS would grant the petition and reverse.